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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/521,847	11/23/2005	Charles Henry Horn	21439-00001	1275
28534 7590 08/01/2008 MIRICK, O'CONNELL, DEMALLIE & LOUGEE, LLP 1700 WEST PARK DRIVE WESTBOROUGH, MA 01581				
EXAMINER ARIANE, KADE				
ART UNIT		PAPER NUMBER		
1651				
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08/01/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/521,847

**Applicant(s)**

HORN ET AL.

**Examiner**

KADE ARIANI

**Art Unit**

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 April 2008.  
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 23, 24 and 26-57 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 23, 24 and 26-57 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO-8508)  
Paper No(s)/Mail Date \_\_\_\_\_  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_

***DETAILED ACTION***

The amendment filed on April 29, 2008, has been received and entered.

Claims 23, 24, and 26-57 are pending in this application and were examined on their merits.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 04/29/2008 has been entered.

***Declaration under 37 C.F.R. § 1.132***

The Declaration under 37 CFR 1.132 filed on 04/29/2008 is insufficient to overcome the rejection of claims 23, 24, and 26-57 based upon Leedle et al. as set forth in the last Office action.

An affidavit or declaration under 37 CFR 1.132 must compare the claimed subject matter with the closest prior art to be effective to rebut a prima facie case of obviousness.

In this case the declaration is comparing the closest prior art to *M. elsdenii* CH 4 and not to the *M. elsdenii* strain NCIMB 41125 or *M. elsdenii* strain displaying at least 97% similarity to a 16S ribosomal RNA sequence as that of the *M. elsdenii* deposited under number NCIMB 41125.

### ***Claim Objection***

The objection to claim 55 is withdrawn due to Applicant's amendments to the claims filed on 04/29/2008.

Applicant's arguments with respect to claims 23, 24, and 26-57 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 23 and 26-57 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to

one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 23 is drawn to a biologically pure culture of an acid tolerant stain of *M. elsdenii* displaying at least 97% similarity to a 16S ribosomal RNA sequence as that of the *M. elsdenii* deposited under number NCIMB 41125.

However, the disclosure contains the results of 16S rRNA comparison between *M. elsdenii* strains CH4, CH7, ATCC 17752, and ATCC 25940 (Figure 3.) and the growth rate on lactate medium. The disclosure does not disclose any results showing 16S ribosomal RNA sequence of *M. elsdenii* NCIMB 41125 and comparing the 16S ribosomal RNA sequence of *M. elsdenii* NCIMB 41125 with other strains, and any result showing a strain of *M. elsdenii* displaying at least 97% similarity to a 16S ribosomal RNA sequence as that of the *M. elsdenii* deposited under number NCIMB 41125.

Claims 24-57 are rejected because they depend on claim 23.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

The rejection of claims 51-57 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is withdrawn due to applicants amendments to the claims filed on 04/29/08.

***Claim Rejections - 35 USC § 102/103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 24 is rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Das (US patent No. 4,138,498).

Claims 24 is drawn to a biologically pure bacterial culture of *M. elsdenii* (deposited under number NCIMB 41125).

Das teaches a biologically pure bacterial culture of *M. elsdenii* (see Abstract, and Example 1.).

Das does not teach strain 41125. However, Das *M. elsdenii* appears to be the same or an obvious variant of the claimed *M. elsdenii*.

Therefore, Das *M. elsdenii* anticipates the claimed bacterial culture or is an obvious variant of the claimed bacterial culture.

***Conclusion***

No claims are allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kade Ariani whose telephone number is (571) 272-6083. The examiner can normally be reached on 9:00 am to 5:30 pm EST Mon-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (571) 272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leon B Lankford/  
Primary Examiner, Art Unit 1651

Kade Ariani  
Examiner  
Art Unit 1651